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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 564

FRANK P. BATTAGLIA and THOMAS TORCHIA,
a partnership doing business as
PRODUCE TRANSPORT DISPATCH
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION OF RAILROAD APPELLEES TO AFFIRM

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Pursuant to Rule 16 of the Revised Rules of this Court, the appellees listed in the appendix hereto move that this Court affirm the judgment of the District Court on the ground that the judgment is so clearly correct that plenary review of this Court is not warranted.

QUESTIONS PRESENTED

We do not agree with appellants' statement of questions presented. We believe the questions presented are the following:

1. Whether this suit is precluded by reason of the final order and judgment of the District Court for the District of Oregon entered March 29, 1962, affirming the order of the Interstate Commerce Commission determining the scope of "grandfather" rights established by appellants.

2. Whether the Commission's order denying appellants' petition for leave to file a third petition for reconsidera-

tion long after time had expired under its Rules of Practice and long after entry of the aforementioned order and judgment was a clear abuse of discretion.

3. Whether, assuming arguendo that the foregoing questions are held not to be determinative, the Commission's order delineating appellants' "grandfather" rights is supported by substantial evidence and is not arbitrary or capricious.

STATEMENT

We disagree with most of the legal conclusions and argumentative matter contained in appellants' Statement of the Case. For the purposes of this motion, we agree with the statement to the extent it is factual, with the following exceptions:

We do not find record evidence establishing that appellants hauled mixed loads of frozen fruits, frozen berries, and frozen vegetables, or any combination thereof, as they here claim, (J.S. 7).

Appellants state (J.S. 8) that given numbers of origins and destinations in Oregon, Washington and California were served before and continuously after the critical date. It will be hereinafter shown that most were served only before *or* after the critical date and that repetitive movements established were very limited.

With reference to the request (J.S. 13) that the Commission be compelled to hold further hearing, we point out that at no stage of this proceeding have appellants made such a request of the Commission, although its Rules of Practice[1] make provision therefor. And, further, that in neither court case was the District Court requested to remand for the purpose of holding further hearing.

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1. Rules 1.101(a) and 1.101(b). (49 C.F.R. 1.101(a) and 1.101(b)).

ARGUMENT

This appeal presents no question warranting plenary consideration by this Court. It involves only a repetitious suit involving the same cause of action upon which there is already a final judgment on the merits by a court of competent jurisdiction, and an attempt to persuade this Court that the Commission's rejection of a successive petition for reconsideration tendered some thirty-three months after the time for filing had expired constitutes a clear abuse of discretion. We show below that those issues are determinative and that appellants' contentions to the contrary are without merit. We also show that, in any event, the "grandfather" certificate issued to appellants fully meets the prescribed standards and that the Commission's action is based upon substantial evidence and is not arbitrary or capricious.

1. This Suit is Precluded by Reason of the Prior Order and Judgment of the District Court.

The Commission's order of October 24, 1961, delineated the "grandfather" rights of appellants. That order was judicially reviewed by the District Court for the District of Oregon, which by order and judgment entered March 29, 1962, dismissed appellants' complaint on the merits (J.S. 54). No appeal was taken.

This subsequent action was brought in the same forum. The parties and the issues are the same. The ultimate question sought to be adjudicated is whether the affirmed Commission order reasonably and properly determined appellants' "grandfather" claim. That is precisely the question which was judicially determined in the prior action.

This suit is precluded. For, it is a repetitious suit involving the same cause of action upon which a court of compe-

tent jurisdiction has entered a final order on the merits. The parties were thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose, even in a subsequent action on a different cause of action. *Commissioner* v. *Sunnen*, 333 U.S. 591; *Hoag* v. *New Jersey*, 356 U.S. 464.

Although no authorities are offered in support of such a position, appellants seemingly urge that their case presents an exception to the general rule by reason of so-called new law that was made after the District Court's first judgment. It is not necessary to examine the legal significance of that contention, for the plain fact is the pertinent law has remained the same since this Court enunciated it in 1942.

All of the cases relied upon by appellants are bottomed upon *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, in which this Court established standards for evaluating claimed "grandfather" rights under the similarly worded original motor carrier enactment. In the 1964 *Shaw* case[2] —which appellants say inspired the filing of the second suit, albeit they waited more than a year before doing so—this Court again affirmed the *Carolina* criteria and required the Commission to apply them to Shaw's operation.

The *Shaw* case made no new or different law. This Court merely told the Commission to apply the standards prescribed some twenty-two years before in the *Carolina* case.

The Commission's initial order shows on its face that the Commission considered the *Carolina* standards. All parties to the first court proceeding called attention to them. If appellants felt the District Court misapplied them, they should have appealed that case to this Court. It is not

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2. *Willis Shaw Frozen Express, Inc.* v. *U. S., et al.*, 377 U.S. 159.

enough to claim that reaffirmation by this Court of a decision it handed down some twenty-two years before and which stood unquestioned in the interim constitutes momentous new and different law and hence makes inoperative rules precluding this subsequent action.

Moreover, the unappealed prior decision became the law of the case, and whether the law was subsequently changed is of no consequence. *Adriaanse* v. *U. S.*, 184 F. 2d 968 (2nd Cir. 1950), Cert. Den., 340 U.S. 932.

2. The Commission's Rejection of Appellants' Third Petition Tendered Grossly Out of Time, Was a Proper Exercise of Its Broad Discretionary Powers.

Pursuant to appellants' first petition for reconsideration, the Commission entered its order on October 24, 1961. The District Court affirmed on March 20, 1962. After denial of their second petition for reconsideration on May 28, 1963, appellants, on August 6, 1964, filed their petition for waiver of Rule 1.101(e) of the Commission's General Rules of Practice[3] (49 C.F.R. 1.101(e)) and tendered for filing their third petition for reconsideration. By order served November 18, 1964, the Commission denied the request for leave to file and rejected the petition.

Although in the District Court appellants made no such claim in their Petition for Decree or on brief, they now contend that the Commission clearly abused its discretion in declining to entertain their third petition for reconsideration tendered some thirty-three months later than its rules permit and some twenty-nine months after entry of the aforementioned order and judgment of the District Court.

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3. (e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this section must be filed within 30 days after the date of service of a decision or order.

The courts have long recognized that administrative agencies are free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge, as quickly as possible, their many duties.

If litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that an administrative agency could ever enter an order that would not be subject to reopening. Rehearings are not a matter of right, but are pleas to discretion, not to a reviewing court, but to the Commission. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503.

Disposition of appellants' petition for leave to file a third petition grossly out of time was a matter within the Commission's discretion. No showing that the Commission clearly abused its discretion or that it acted arbitrarily or capriciously has been made.

3. The Commission Correctly Applied Applicable Standards. Its Order Confers Substantial Parity, Is Supported by Substantial Evidence, and Is Not Arbitrary or Capricious.

As pointed out by appellants (J.S. 14), the purpose of the "grandfather" clause was to assure to involved carriers substantial parity between prior bona fide operations and future operations.

The Commission's order granted to appellants all of the operating authority that the record can possibly sustain. Grant of more would have exceeded substantial parity, and would have been nothing more than a windfall which Congress did not confer.

Appellants cite several "grandfather" cases in which the

Commission was reversed. Those decisions are not here relevant due to the dissimilarity of controlling facts.

None holds that as a matter of law the Commission is bound to treat frozen fruits, frozen berries and frozen vegetables as a single class of commodity. The cited decisions dealing with that issue merely say that the involved carriers in those cases established as a *fact* that in *their* operations the three commodities were one class. In the instant case, there are no facts of record to substantiate a determination that appellants or their shippers handled the three classes as one.

No cited case holds that, as a matter of law, the Commission is bound to confer an area-wide authority. Here again, the *facts* in individual situations control. The appendix to the Commission's order of February 14, 1961,[4] (J.S. 41-46) lists every shipment handled by appellants from the inception of their frozen food operations in March, 1957, (J.S. 6) to the date of hearing in December, 1959. It graphically reveals that very few repetitive movements were handled, that few traffic patterns were established, and that the Commission granted every bit of authority conceivably substantiated by the evidence.

It shows, among other things, that of the two California origins served prior to the critical date, none was served subsequently; that of four Washington origins served at any time, only two were served prior and only Sumner was served after the critical date; that frozen fruits were transported both prior and subsequent to the critical date only from Portland, Oregon to Sacramento, California; that in four instances, the Commission granted authority notwithstanding the fact that only one prior and one subsequent shipment was transported; and that the Commission

4. Affirmed by its order of October 24, 1961.

granted authority in every instance in which there was both a prior and a subsequent movement.

Appellants insist that it was error of law not to grant authority to transport all three commodities between all points in Oregon and Washington, on the one hand, and, on the other, all points in California. If only the fact there was not a single recurring movement from a single California origin is considered, the extremely tenuous position of appellants is exposed.

Substantial, as distinguished from incidental, sporadic or infrequent, service is required to substantiate a "grandfather" claim. It is necessary to establish actual rather than potential or simulated service. A holding out to serve an area is not alone sufficient. *U. S.* v. *Carolina Freight Carriers Corp., supra.*

Where, as here, there is no underlying operation of substance upon which to base a claimed holding out to serve between such broad, productive areas, such claim is ineffective.

The cases cited by appellants have no application to the facts in the instant case. The Commission's order is supported by the evidence. Its action was not arbitrary or capricious. It and the court below applied proper criteria, and the granted operating rights conferred full parity.

CONCLUSION

The appeal presents no substantial question warranting review by this Court, and the judgment of the District Court should be affirmed.

Respectfully submitted,

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October, 1966

APPENDIX

NAMES OF RAILROAD APPELLEES

The Atchison, Topeka and Santa Fe Railway Company
Chicago and North Western Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Fort Dodge, Des Moines & Southern Railway Company
Great Northern Railway Company
Green Bay and Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
The Kansas City Southern Railway Company
Missouri-Kansas-Texas Railroad Company
Northern Pacific Railway Company
St. Louis-San Francisco Railway Company
Soo Line Railroad Company
Southern Pacific Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad Company

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FRANK P. BATTAGLIA AND THOMAS TORCHIA, D/B/A PRODUCE TRANSPORT DISPATCH, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. A) dismissing appellants' suit to set aside an order (J.S. 21–22) of the Interstate Commerce Commission. The basic issue is the validity of the Commission's partial denial of appellants' application for motor-carrier "grandfather" authority under Section 7(c) of the Transportation Act of 1958 (72 Stat. 573, Appendix, *infra*,

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p. 7) to transport frozen fruits, berries, vegetables and other commodities.

Section 7 amended the agricultural-commodities exemption of the Interstate Commerce Act (Section 203(b)(6), 49 U.S.C. 303(b)(6)) to require a Commission certificate or permit for the interstate motor transportation of specified commodities, including frozen fruits, frozen berries, and frozen vegetables. To protect the interests of carriers already engaged in such transportation, Section 7(c) (the "grandfather" clause) provided that, upon timely application, the Commission, "without further proceedings," would issue a certificate or permit to any person who, on May 1, 1958, and continuously thereafter, was "in bona fide operation" in the motor transportation of the commodities involved.

On October 14, 1958, appellants filed an application for "grandfather" authority to transport frozen fruits, frozen berries, frozen vegetables and certain other produce commodities from any points in Oregon and Washington to any points in California. After a hearing (J.S. App. C), the Commission found that appellants' operation had not been so extensive as claimed, and the Commission granted appellants authority to transport each of the frozen commodities only between specified points (J.S. App. D). The Commission's ruling was affirmed by a three-judge district court on March 29, 1962 (J.S. App. F), and appellants did not appeal.

On February 26, 1963, appellants asked the Commission for leave to file a petition for reopening and recon-

sideration. The Commission accepted the petition for filing, but denied reconsideration, on the ground that its prior findings, sustained by the district court, were "in accordance with the evidence and the applicable law" (J.S. App. H). On August 14, 1964, appellants again asked the Commission for leave to file a petition for reconsideration, arguing that under this Court's decision in *Willis Shaw Frozen Express, Inc.* v. *United States,* 377 U.S. 159, they were entitled to broader authority. The Commission denied the petition. It held that the *Shaw* decision was not in conflict with the district court's decision upholding its previous order and that there was "no sufficient or proper basis" for reconsideration of its findings (J.S. App. B).

On appeal, the district court upheld the Commission's order "on the ground that the Commission did not abuse its discretion in denying the petition for reconsideration on the grounds set forth in the Commission order" (J.S. 19). The court further held that "no adequate ground * * * has been shown" for vacating the court's earlier judgment (J.S. App. A).

ARGUMENT

We believe that this appeal presents no substantial question warranting plenary consideration by this Court. The legal standards of the grandfather clause of Section 7(c) were fully considered by this Court in *Willis Shaw Frozen Express, Inc.* v. *United States,* 377 U.S. 159, and the present case involves only the application of those standards to the particular facts. After the *Shaw* case, a number of applicants asked